United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

B
P/S

74-2399

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

-v.-

GUISEPPE BARBERA,
Defendant-Appellee.

Appeal from an Order Granting Defendant's Motion to Suppress by the United States District Court for the Northern District of New York.

BRIEF FOR APPELLEE

FRIED, FRAGOMEN & DEL REY
515 Madison Avenue
New York, New York 10022

FEIT, SCHLENKER & PATACK
DENNIS B. SCHLENKER, *Of Counsel*
182 Washington Avenue
Albany, New York 12210
Attorneys for Appellee

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5200

TABLE OF CONTENTS

Page

Issues Presented----------1

Statement of the Case----------2

ARGUMENT:

POINT I--Terry v. Ohio is misapplied--THE SOLE ISSUE BEFORE THE COURT IS WHETHER MALONE, NEW YORK CONSTITUTES A FUNCTIONAL EQUIVALENT OF THE BORDER----------3

POINT II--MALONE, NEW YORK, IS NOT THE FUNCTIONAL EQUIVALENT OF THE BORDER----------12

POINT III--THE ROVING PATROL IS NOT MORE REASONABLE AND LESS INTRUSIVE THAN A FIXED INTERIOR CHECKPOINT AND CANNOT BE SUSTAINED ON SUCH BASIS----------17

Conclusion----------18

List of Authorities

Cases

Almeida-Sanchez v. United States, 413 U.S. 266; 93 S.Ct. 2535 (1973)----------3,4,5,6,7,11,12,13,14,17,18

Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967)----------5

Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925)----------5,7

Karnuth v. United States, 279 U.S. 231, 49 S.Ct. 274 (1929)----------13

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968)----------6,7,8,9,11,12,16

United States v. Baca, 368 F.Supp. 398 (S.D.Cal. 1973)----------5

United States v. Bowen, 500 F.2d 960 (9th Cir. 1973)----------13,14,17,18

Page

United States v. Bursey, 491 F.2d 531 (5th Cir. 1973)----7

United States v. Byrd, 483 F.2d 1196 (5th Cir. 1973)----13

United States v. Glaziou, 402 F.2d 8 (2nd Cir. 1968), cert. denied 393 U.S. 1121 (1969)----7

United States v. McDaniel, 463 F.2d 129, 132, 133 (5th Cir. 1972)----11

United States v. Mitchell, 472 F.2d 67 (9th Cir. 1973)----8

United States v. Petersen, 473 F.2d 874 (9th Cir. 1973)----8

United States v. Rodriguez-Hernandez, 493 F.2d 168 (5th Cir. 1974)----7

United States v. Speed, 497 F.2d 546 (5th Cir. 1974)----7

United States v. Storm, 480 F.2d 701 (5th Cir. 1973)----7

United States v. Weil, 432 F.2d 1320 (9th Cir. 1970), cert. denied 401 U.S. 947 (1971)----8

United States Constitution

Fourth Amendment----4

United States Statute

8 U.S.C.A. §1357----4

Federal Regulation

8 C.F.R. §287.1----4

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

-against-

GUISEPPE BARBERA,

Defendant-Appellee.

Appeal from an Order Granting Defendant's Motion to Suppress by the United States District Court for the Northern District of New York

---

BRIEF FOR DEFENDANT-APPELLEE

ISSUES PRESENTED

I. Whether the sole issue before the Court is the definition of functional equivalent of the border as applied to Malone, New York?

II. Whether Malone, New York is the functional equivalent of the border?

III. Whether a roving patrol type activity is by its nature reasonable?

STATEMENT OF THE CASE

On April 3, 1974, defendant-appellee GUISEPPE BARBERA was charged by information with illegally entering the United States by eluding inspection contrary to Title 18, United States Code, Section 1325.

The facts of said charge indicate that BARBERA boarded a bus at Massena, New York and travelled non-stop approximately 39 miles east to Malone, New York. Officer Cowan, a border patrol agent, while on a roving type patrol in the area of the Border Patrol Line Station, boarded the bus at its regularly scheduled stop, the Watkins Travel Agency in Malone, New York, purportedly pursuant to his routine duties.

Upon inquiry of the bus driver, Officer Cowan learned that the bus had never crossed the Canadian border, had originated in Massena, New York, had neither stopped nor picked up any passengers since departing from Massena and had not been inspected at that location. The officer boarded the bus and proceeded to interrogate the passengers as to their citizenship. The defendant did not respond to the officer's questioning, and he was directed by gesture and physical contact to leave the bus and follow the officer into the bus station.

The subsequent interrogation by the Border Patrol officer revealed appellee did not possess valid travel documents and accordingly he was placed under arrest and his passport and bus ticket seized in evidence.

On April 24, 1974, appellee moved to suppress certain evidence,

to wit: his passport and bus ticket. On September 27, 1974, at Syracuse, New York, a suppression hearing was held in the United States District Court for the Northern District of New York, the Honorable Edmund Port, District Court Judge, presiding.

Absent a factual showing of probable cause for the stop and search and pursuant to the stipulation of the parties, the single issue to be decided with respect to the grounds for suppression of evidence was whether the search and discovery of the evidence at Malone, New York bus station was made at the functional equivalent of the border under the rationale of the United States Supreme Court decision in Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535 (1973).

On September 30, 1974, the District Court granted defendant's motion to suppress, holding that Malone, New York, under the facts and circumstances of the instant case, was not the functional equivalent of the border for purposes of a border search under the ruling in Almeida-Sanchez, supra.

Appellant has taken this appeal pursuant to Title 18, United States Code, Section 3731, in order to review the legal propriety of the order suppressing the evidence.

ARGUMENT AND AUTHORITIES

APPELLEE'S FIRST POINT

THE SOLE ISSUE BEFORE THE COURT IS WHETHER

MALONE, NEW YORK, CONSTITUTES A
"FUNCTIONAL EQUIVALENT OF THE BORDER".

Appellee contends that the evidence consisting of a passport and bus ticket sought to be admitted against him at trial of this cause was properly suppressed by the court below.

Appellee further submits that said items were obtained neither as a result of a valid border search nor made at the functional equivalent of the border under the rationale of Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

8 U.S.C. §1357(a)(3) of the Immigration and Naturalization Act provides authority for an immigration officer to stop and search any conveyance or vehicles for aliens within a reasonable distance from any external boundary of the United States. "Reasonable distance", as defined in that section of the act, means "within 100 air miles from any external boundary of the United States". 8 C.F.R. §287.1.

This statute and regulation, however, has been sharply limited by the Almeida-Sanchez decision. In that case, petitioner's automobile was stopped by the Border Patrol in a "roving patrol type situation" twenty-five air miles north of the Mexican border on a California east-west highway that at all points lies at least twenty miles north of the border. 413 U.S. 267-268. The ensuing search yielded certain items of contraband. The Court, in its holding that the warrantless search violated defendant's Fourth Amendment rights, rejected two argu-

ments set forth by the Government as justification for such type of activity; the automobile search line of cases enunciated in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925) and the administrative search type of situation, Camara v. Municipal Court, 387 U.S. 523 (1967). A plurality of the Court, per Mr. Justice Stewart, stated:

> "Since neither this Court's automobile search decisions or its administrative inspections decisions provide any support for the constitutionality of the stop and search in the instant case, we are left simply with the statute that purports to authorize automobiles to be stopped and searched without a warrant and 'within a reasonable distance from any external boundary of the United States'
>
> . . . adding that
>
> "whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only on the border itself but at its functional equivalent as well." 413 U.S. at 272.

The judicial inquiry which Almeida-Sanchez mandates is primarily a factual one, that whether a search is a border search since, once it so finds, a court will not be required to determine whether the search is justified on the basis of a legally sufficient warrant or if not, whether it is nonetheless proper under one of the exceptions to the warrant requirement. See United States v. Baca, 368 F.Supp. 398 (S.D. Cal. 1973).

In the instant case, the border patrol agent who boarded the bus to interrogate the appellee possessed no facts which constituted even a

founded suspicion that he or any other passengers were illegal aliens (tr. Sept. 27, pp. 54, 55). The officer merely possessed information that the bus in question had never crossed the United States-Canadian border, had originated in Massena, New York, some eight miles from the point of entry, had not been inspected at that point and had travelled non-stop within the State of New York directly to Malone, New York (tr. Sept. 27, pp. 43, 44).

The Government has conceded as much by its stipulation to the single issue of concern before the court below:

> "That if the Malone bus station is found to be a functional equivalent under the Almeida-Sanchez ruling, then the search and the discovery--what was it, the passport and ticket--were lawful, then the motion for suppression should be denied. If on the other hand the government stipulates that if under all the circumstances, if the bus station should not be considered a functional equivalent, if it is not found to be a functional equivalent of the Border, then the motion should be granted". (tr. Sept. 30, Findings of the Court, p. 74).

By virtue of the parties stipulation, any inquiry relative to whether any intrusion of the bus for purposes of interrogation could be condoned under the probable cause rationale of Terry v. Ohio is foreclosed; the sole issue before the Court is whether Malone, New York, under the facts presented by the case at bar, is the functional equivalent of the border pursuant to the decision of the Almeida-Sanchez Court.

Even though appellee submits that the appellant's stipulation

before the court below forecloses the inquiry, it is further submitted that appellant's reliance upon the probable cause rationale of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1863 (1968), is clearly misplaced.

Even prior to Almeida-Sanchez, mere proximity to the border did not justify surveillance of the type here. United States v. Storm, 480 F.2d 701 (5th Cir. 1973).

Although the so-called border search has long been recognized as an exception to the warrant and probable cause requirements of the Fourth Amendment, Carroll v. United States, supra, it has been held that border searches are not entirely exempt from the Fourth Amendment. United States v. Rodriguez-Hernandez, 493 F.2d 168 (5th Cir. 1974).

Under the appellant's view, to hold that the search at issue may reasonably be justified as an extended border search under Terry would require a finding that the agent who conducted the search had reasonable cause at the time to suspect a violation of law and at the time of the search, the suspect must have had some reasonably direct connection with the border, considering such factors as the cause for the initiation of the search, the distance from the border, the original point of entry and time elapsed since. United States v. Speed, 497 F.2d 546 (5th Cir. 1974); United States v. Bursey, 491 F.2d 531 (5th Cir. 1973); See also, United States v. Glaziou, 402 F.2d 8 (2nd Cir. 1968), cert. denied 393 U.S. 1121 (1969).

Similarly, in a related line of cases, the Ninth Circuit has treated

a search away from the border as a border search where it appeared with reasonable certainty that the conveyance searched contained either goods which have just been smuggled or a person who has just crossed the border illegally. See, e.g., United States v. Weil, 432 F.2d 1320 (9th Cir. 1970), cert. denied 401 U.S. 947 (1971); United States v. Petersen, 473 F.2d 874 (9th Cir. 1973); United States v. Mitchell, 472 F.2d 67 (9th Cir. 1973). Totally lacking from the record are any facts which might even give rise to a suspicion of illegal activity.

In Terry v. Ohio, supra, upon which appellant asserts reliance, the Supreme Court sustained as lawful the actions of a police officer who observed an articulable factual situation, consisting of the unusual conduct of defendant and two other men and concluded, based upon the articulated facts, when combined with his experiences, that the men contemplated a daylight robbery, stopped and frisked them, thereby discovering weapons. The search was held reasonable and the revolver seized was properly introduced in evidence on the basis that the police officer reasonably concluded, in light of the actual conduct of the parties and of his experiences, that persons with whom he was dealing might be armed and dangerous.

The United States Supreme Court's standards for the "reasonable suspicion" which would justify a limited warrantless intrusion consistent with the Fourth Amendment is expressly stated in Terry, as follows:

> "...in justifying the particular intrusion the police officer must be able to point to specific

> and articulable facts which, taken together with rational inferences from those facts, reasonably warrants that intrusion." 88 S.Ct. 1880 (emphasis added.)

But the specific and articulable facts of the case at bar do not justify the interrogation. Officer Cowan had observed no conduct which could justify a reasonable suspicion that the crime of illegal entry was being or had been committed. Based on the facts known to him, he knew only that a bus, which had never crossed the Canadian border, had originated in Massena, New York (a city some three miles from the United States-Canadian border) had travelled eastward some 39 miles to Malone, New York without picking up passengers and was making a scheduled stop at Malone, New York. Under no stretch of the imagination could these facts, under the express Terry standard, be thought to give rise to a rational inference that any unlawful activity which might warrant an intrusion was taking or had taken place. The Terry court is adamant in holding that inarticulable hunches of police officers, unsupported by a specific articulable factual situation which reasonably leads to the rational inference that unlawful activity may be taking place, cannot be used to sanction intrusions upon personal security under the Fourth Amendment.

Despite the express holding of the Terry court, the Government seeks to justify such intrusions by expanding the Terry doctrine to authorize such intrusions when based on the questionable theory of an

"institutionalized reasonable suspicion". Apparently the Government would have one believe that based on the "fact" that there are aliens who have entered the United States by eluding inspection and may be in the vicinity of a border of the United States, that "fact" gives rise, with nothing more to authorize it, to an "institutionalized reasonable suspicion" sufficient to authorize wholesale border type searches within the borders of the United States. This is merely an attempt to elevate inarticulable hunches of Border Patrol officers to legally permissible intrusions because the "everybody knows that" approach will always, under the theory stated in the Government's brief, give rise to an "institutionalized reasonable suspicion" and it is alleged that the "institutionalized reasonable suspicion" justifies the intrusion.

It is well known that Mexican nationals who have unlawfully entered the United States, go to Chicago, Illinois to work in factories and reside in ethnic neighborhoods. If an "institutionalized reasonable suspicion" theory were to prevail, without more to authorize it, the Immigration and Naturalization Service boarding of Chicago public transit buses travelling through such city areas for the wholesale questioning of each person as to his right to be in the United States would be permissible without regard to the Fourth Amendment. All automobile or public conveyance travel within the borders of the United States, somewhat near to the border, and across the approximate 3,000 miles of Northern and Southern border of the United States, where

innumerable highways which lead to the borders intersect, would be subject to unfettered stops for interrogation of the occupants of such vehicles as to their right to be in the United States.

Without burdening the Court with further examples, let it suffice to say that there cannot, consistent with Fourth Amendment guarantees, be an "institutionalized reasonable suspicion". The Court's acceptance of such a theory would be tantamount to judicially condoning the practices of totalitarian countries the world over who coin such [illegible] as "institutionalized" and practice unfettered infringement of [illegible] liberties, under the guise of law enforcement necessity. The authority to stop and interrogate, in the limited Terry type situation, when no probable cause or consent is present as is admittedly the case in the case at bar, must be based on reasonable suspicion which is in turn based on articulable facts which reasonably give rise to reasonable inferences of unlawful conduct. As the Fifth Circuit Court of Appeals stated in United States v. McDaniel, 463 F.2d 129, 132, 133 (5th Cir. 1972):

> "Proximity to the frontier does not automatically place a 100 mile strip of citizenry within a deconstitutionalized zone, with its attendant de-escalation of Four Amendment requirements."

The explicit language of Almeida-Sanchez renders Terry inapposite:

> "...It is undenied that the Border Patrol had no search warrant and that there was no probable cause of any kind for the stop or the subsequent search—

> not even the 'reasonable suspicion' found sufficient for a street detention and weapons search in Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868; and Adams v. Williams, 407 U.S. 143, 32 L.Ed.2d 612, 92 S.Ct. 1921". 413 U.S. at 268.

It must be noted that the Government has conceded (Gov't. brief, p. 23) that were New York City the destination of the conveyance, there is no need for immediate action or the intrusion since other sources of information about unlawful alien status, such as employment records, etc., are available at that location. Since the bus destination was New York City, as is verified by the ticket confiscated, it follows by the Government's own admission that the intrusion was unlawful and the evidence seized as a result should be, and properly was, suppressed.

It is therefore submitted that the sole issue before this Court is whether the Malone, New York bus station is the functional equivalent of the border under the rationale of Almeida-Sanchez.

It is further submitted that no reasonable reading of Terry v. Ohio can give evidence to the Government's position that there existed authority for the conduct here.

APPELLEE'S SECOND POINT

MALONE, NEW YORK, IS NOT THE FUNCTIONAL EQUIVALENT OF THE BORDER.

The function of a border checkpoint is to regulate "border crossings"

in order to effectuate the legislative policy of limiting the number of persons who can legally immigrate into the United States in a given year. See, e.g., Karnuth v. United States, 279 U.S. 231, 49 S.Ct. 274 (1929).

In attempting to clarify what would constitute a functional equivalent of the border, the plurality, per Mr. Justice Stewart, in Almeida-Sanchez, offered two relevant examples:

> "For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a non-stop flight from Mexico City would clearly be the functional equivalent of a border search." 413 U.S. at 272-273. (emphasis added.)

In United States v. Byrd, 483 F.2d 1196 (5th Cir. 1973), the Fifth Circuit Court of Appeals offered yet another example of functional equivalency; that being where a geographical phenomenon creates an avenue for the entry of illegal aliens.

Possibly the most practical suggestion relevant to the issue of defining functional equivalency was set forth by the Ninth Circuit Court of Appeals in United States v. Bowen, 500 F.2d 960 (9th Cir. 1973). The Court there stated:

> "In other words, if a search takes place at a location where virtually everyone searched had just come from the other end of the border, the

> search is a functional equivalent of a border search. In contrast, if a search takes place at a location where a significant number of those stopped are domestic travellers going from one point to another within the United States, the search is not the functional equivalent of a border search. One need only contemplate the volume of domestic travel between Buffalo and Rochester, New York, to see why a checkpoint between those two cities could not be the functional equivalent of a border checkpoint even though the checkpoint could be less than twenty miles from an international border." 500 F.2d at 965. See also, United States v. Esquir-Rivera, 500 F.2d 913 (9th Cir. 1921).

As applied to the instant case, analogy to the Buffalo-Rochester domestic travel situation recited in Bowen, and that between Massena and Malone, New York, would not be inappropriate so as to render Malone not the functional equivalent of a border.

Appellant citing Almeida-Sanchez asserts that Malone is the functional equivalent of the border but seemingly relies entirely upon the first example offered by Mr. Justice Stewart; that its location marks the confluence of two roads extending from the border (Gov't brief, p. 20). Appellant focuses upon the language of a single example, erroneously excluding other critical factors upon which the decision of the court below rests.

The Government's attempt to use the confluence of two or more roads standard as authority alone to authorize a designation of functional equivalent of the border for Malone, New York glosses over the particular factual situation in the case at bar. While under given factual circumstances it might be permissible to stop automobile travel known

to be coming south from Trout River, Rouses Point, or Fort Covington at Malone, New York, the fact remains that the bus in question was known by the officer to have travelled non-stop eastward, from Massena, New York, without crossing the border. Under these facts, the single fact that Malone, New York lies at the confluence of two or more roads extending from the border, cannot be employed to label Malone, New York the functional equivalent of the border so as to authorize border type searches.

The lower court's decision reflects a broader analysis of the functional equivalency issue than that upon which appellant seeks to have this Court rely.

Under the facts of the present case, the Malone, New York bus station cannot be considered the functional equivalent of a border point for vehicles coming non-stop from Massena. Malone, New York is approximately 39 miles from Massena on an almost direct east-west basis (See map, Gov't exhibit No. 1). The bus, upon which appellee was a passenger, originated in Massena and had not crossed the United States-Canada border (tr. Sept. 27, pp. 32,33,34). The bus itself had not stopped since it departed from the Massena origination point, which facts were known to the border patrol officer (tr. Sept. 27, p. 54). In light of the relevant geographic findings made by the court below (Findings of the Court, tr. Sept. 30, p. 75), and upon the factual circumstances of the defendant's travel itinerary presented by the

instant case, Malone, New York, cannot fairly be said to be the functional equivalent of the border.

As the court below correctly stated:

> "Here was a bus that never left the United States, never went into Canada, never had an opportunity any more than in New York City, where I am sure there are thousands of immigrants who are illegally in the United States. Probably a random search of any bus in New York City would be as profitable on the average in uncovering illegal entrants to the United States as this bus was." (Findings of the Court, Sept. 30, tr. p. 78,79).

Appellant's brief recites that if one does not apply the rationale of Terry, then "it is difficult to formulate any test for determining whether a particular point is the functional equivalent of the border". (Gov't brief, p. 19). Appellants would have this Court be guided simply by the suggestion that any point near a border marking the confluence of two or more roads extending from the border may be its functional equivalent. The court below tacitly agreed with the predicate "may", stating that

> "Under the circumstances I can see, well see, that points in and around Malone might be..." (Findings of the Court, Sept. 30, tr. p. 79) (emphasis added)

but went considerably further in utilizing other facts in its analysis. The words "may" and "might be" are not dispositive but merely conjectural on the issue. The court below correctly found that, under all

the facts of the instant case, Malone was not the functional equivalent of the border.

It is therefore submitted that Malone, New York, is not the functional equivalent of the border.

APPELLEE'S THIRD POINT

THE ROVING PATROL IS NOT MORE REASONABLE AND LESS INTRUSIVE THAN A FIXED INTERIOR CHECKPOINT AND CANNOT BE SUSTAINED ON SUCH BASIS.

The Border Patrol conducts three types of surveillance activity in the asserted interest of detecting the illegal importation of aliens: permanent checkpoints at certain nodal intersections; temporary checkpoints at various places; and roving patrols such as the one that investigated the conveyance on which defendant was a passenger. See Almeida-Sanchez v. United States, 413 U.S. at 268.

The Government, as a last line of defense, attempts to argue that a roving patrol type activity, the very same type of surveillance held unlawful in Almeida-Sanchez, is less intrusive than a fixed interior checkpoint. While the predicate to the appellant's argument, i.e., that the Malone, New York bus station is the functional equivalent of the border, is the only issue before the Court; the point taken, however its irrelevancy to this appeal, is also without merit.

In United States v. Bowen, supra, the Government paradoxically

argued the very opposite view that it posits here, that there was in fact a significant constitutional difference between roving patrols and fixed checkpoints, the latter being less intrusive and thus not susceptible to traditional Fourth Amendment standards. No reason is set forth for the Government's change of view in the instant case. While the court in Bowen agreed with the view that a fixed checkpoint search is probably less offensive than a roving patrol search, it stated that:

> "The opinion in Almeida-Sanchez delivered by Mr. Justice Stewart leaves little doubt that traditional Fourth Amendment standards apply to fixed checkpoint searches as well as to roving patrol searches." 500 F.2d 963
>
> . . . adding
>
> "To be sure, Mr. Justice Powell in his concurrence and Mr. Justice White in his dissent both correctly pointed out that Almeida-Sanchez did not present a question of a fixed checkpoint search. See 413 U.S. at 275-276, 288. Nonetheless, these disclaimers do not override clear indication that any distinction between fixed and moveable checkpoints will be meaningless unless the distinction can be based upon Fourth Amendment considerations." Id.

It is therefore submitted that as the facts of the instant case involve the very same type of intrusion as Almeida, the appellant's contention is misplaced and without legal of factual support.

CONCLUSION

THE ORDER GRANTING THE DEFENDANT'S MOTION TO SUPPRESS WAS CORRECT IN FACT AND LAW

AND THEREFORE SHOULD BE AFFIRMED.

Respectfully submitted,

FRIED, FRAGOMEN & DEL REY
515 Madison Avenue
New York, New York 10022

FEIT, SCHLENKER & PATACK
182 Washington Avenue
Albany, New York 12210

by _____
DENNIS B. SCHLENKER, ESQ., Of Counsel

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 27 day of Dec. , 1974 deponent served the within Brief upon James Sullivan Thomas P. O'Sullivan

attorney(s) for appellee

in this action, at Federal Bldg - Federal Bldg
Albany, NY. Albany, NY

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
27 day of Dec 1974

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976